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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Gloria Kortum--Designated Employee Agent

File: B-311266

Date: April 15, 2008

Gloria Kortum, Designated Employee Agent, for the protester.
C. Charles Caruso, Esq., Department of Veterans Affairs, for the agency.
Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest objecting that agency intended to convert performance of home oxygen services to contractor performance in violation of law is dismissed as academic where agency currently has no plan to convert to contractor performance, and will consider whether to include the services at issue in a forthcoming solicitation.

DECISION

Gloria Kortum, an employee of the Department of Veterans Affairs (VA), and the designated employee agent¹ for certain allegedly affected employees, protests that the VA is converting the performance of home oxygen services at the Nebraska/Western Iowa Health Care System in Grand Island, Nebraska to contractor performance without a competition. The protester objects that the VA intends to transition to contractor performance even though a cost comparison showed that performance by the affected employees would be more cost-effective.

We dismiss the protest.

¹ Recently enacted changes to our bid protest statute grant interested party status to any one individual who has been designated as the agent of federal employees for purposes of representing them in a public-private competition, or for purposes of arguing that a public-private competition is required under the circumstances presented. Hence, we will adopt the term, "designated employee agent" to refer to both the protester and the person selected to represent federal employees in these challenges. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 326, 122 Stat. 3 (2008).

According to the protest, on February 8, 2008, the protester learned that the VA intended to convert the performance of home oxygen services from federal employees to a contractor.² The protester raises several objections to what she alleges is an imminent effort to convert these services to contractor performance. First, the protester objects that such a conversion violates restrictions on the use of VA appropriations because the expected savings would fall short of the differential required by statute. Protest at 2 (citing Military Construction & Veterans Affairs & Related Agencies Appropriations Act, 2008, Pub. L. 110-161, § 228, 121 Stat. 1844, 2273). Second, the protester argues that the VA used medical appropriations for an unauthorized purpose by comparing the cost of performance by federal employees with those of a contractor. Protest at 3 (citing 31 U.S.C. § 8110(a)(5)). And finally, the protester argues that the VA has violated Office of Management and Budget (OMB) Circular No. A-76 by making the decision to convert to contractor performance without following the requirements of the OMB Circular, which among other things, would have required the VA to notify affected employees of the initiation of a cost comparison. Protest at 3.

By letter dated March 17, 2008, the VA requested that our Office dismiss this protest because it has agreed to take no action to contract for home oxygen services now being provided by federal employees at the Grand Island, Nebraska VA Medical Center through June 30, 2008, which is the expiration date for the current home oxygen services contract used in the Veterans Integrated Service Network (VISN).³ Between now and June 30, the VA advises that it will consider whether to include the Grand Island, Nebraska area in a forthcoming solicitation for a successor VISN-wide contract, and will ensure that the protester is made aware of the issuance of the solicitation. Since a decision about obtaining the home oxygen services at issue by contract is no longer imminent,⁴ the VA contends that the pending protest is academic at this time.

By letter dated March 18, the protester alleges that any resumption of consideration of contracting for the home oxygen services at issue would be based on planning allegedly conducted in violation of law and regulation.

² According to the protest, more than 10 employees perform the home oxygen services at issue here. Protest at 3.

³ A VISN is an administrative region and can include multiple states and parts of neighboring states. As relevant here, VISN 23 includes Nebraska.

⁴ In a conference call with the parties held by our Office on March 17, the VA appeared to dispute whether the information obtained by the protester on February 8 represented an official VA decision. Nevertheless, in light of the VA's representation that the incumbent contract will not be modified, we consider this question to be academic.

The Government Accountability Office has held that we will not consider a protest where the issue presented has no practical consequences with regard to an existing federal government procurement, and thus is of purely academic interest. We do not consider academic protests because to do so would serve no useful public policy purpose. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. While our Office's jurisdiction over protests now extends to decisions to convert the performance of an activity or function to a contractor without a competition under OMB Circular No. A-76, see National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 326, 122 Stat. 3, ___ (to be codified at 31 U.S.C. § 3551), where the agency has not made such a decision (or where the agency is reconsidering such a decision), a protest of that decision is likewise rendered academic.

The protest is dismissed.

Gary L. Kepplinger
General Counsel